

## The urgency of victim witness testimony as valid evidence from persons with disabilities is associated with Law Number 12 of 2022 concerning the Crime of Sexual Violence

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### ABSTRACT

**Keywords:** witness statements; sexual violence; proof; people with disabilities; sexual violence crime law. Persons with disabilities often receive discriminatory treatment, due to their physical and/or mental limitations. The Criminal Procedure Code regulates that people with disabilities can give statements without being under oath and these provisions have reduced the rights of persons with disabilities to obtain their justice rights. The Sexual Violence Crime Law regulates where the statements of witnesses and/or victims of people with disabilities can be under oath. The approach method used in this research is a normative juridical approach that is based on formal regulations, as well as secondary data obtained from library materials in the form of scientific writings and other written sources. This research will illustrate the importance and the implication of the testimony of witnesses and/or victims with disabilities having the same legal force as the statements of witnesses and/or victims without disabilities where the testimony must be followed by the implementation of a personal assessment.



### Introduction

The 1945 Constitution of the Republic of Indonesia (1945 Constitution) aims to protect the entire nation of Indonesia, which means Indonesia, in this case, the Government is obliged to protect all people regardless of the group, tribe, or situation of the society itself (Alfanada, Hidayat, & Saipudin, 2023). As Article 28 D paragraph (1) of the 1945 Constitution states "Everyone has the right to fair legal recognition, guarantee, protection, and certainty as well as equal treatment before the law".

Persons with disabilities as part of Indonesian society also have the right to recognition, guarantee, protection and legal certainty that fair and equal treatment before the law (Mangiwa & Gultom, 2022). Article 1 number 1 of Law Number 8 of 2016 concerning Persons with Disabilities, it is explained that persons with disabilities are any person who experiences physical, intellectual, mental and/or sensory limitations for a long period, where when interacting with the environment can experience obstacles and difficulties to participate fully and effectively with other citizens based on equal rights

(Novianti & Fadila, 2023). Through this understanding, we can see the variety of disabilities including people with physical disabilities, people with intellectual disabilities, people with mental disabilities; and/or persons with sensory disabilities (Kadoen Mt, 2020). The variety of disabilities can be experienced in single, multiple or multiple over a long period and must be determined by medical personnel by the provisions of laws and regulations (Ni'mah & Rusdiana, 2022).

Persons with disabilities have the right to all rights stipulated in laws and regulations, for example in Article 28G paragraph (2) of the 1945 Constitution which states that "everyone has the right to be free from torture or treatment that degrades the degree of human dignity and has the right to obtain political asylum from other countries", or Law Number 39 of 1999 concerning Human Rights Article 33 which stipulates that "everyone has the right to be free from torture, punishment or treatment that is cruel, inhuman, degrading to the dignity and dignity of humanity" (Nova & Elda, 2022).

In reality, people with disabilities often receive discriminatory treatment, degrading their humanity due to their physical, intellectual and/or mental limitations (Nasir & Jayadi, 2021). The 2023 Komnas Perempuan Annual Report states that women with disabilities have a greater vulnerability to becoming victims of sexual violence compared to women who are not disabled (MAHULAE, 2023). This is because people with disabilities have physical and/or mental limitations that make it difficult for people with disabilities to defend themselves (Wahyudi, 2021). For example, people with intellectual and/or mental disabilities who have limitations in understanding or classifying the actions that have been taken against them or people with physical disabilities who have difficulty performing acts of self-defence (Pawestri, 2017).

Discriminatory treatment, degrading the degree and dignity of humanity for persons with disabilities does not only come from physical and/or mental limitations but can come from a lack of understanding and awareness of the community, the government, law enforcement officials and even the law itself about the situation of persons with disabilities (Nurhayati, 2016). People with disabilities still often receive discrimination and negative stereotypes that are not only carried out by perpetrators, communities, families, and even law enforcement officials. Negative stereotypes by law enforcement officials of victims, such as of people with disabilities who cannot provide information clearly, in order, and so on, can hinder the protection and access of victims to obtain justice both in the reporting stage and in court decisions (Nopiah & Islami, 2022).

Discrimination against people with disabilities gives an idea of the ineffectiveness of law enforcement. The ineffectiveness can be influenced by three factors, namely due to the substance, structure and culture of the law, where the three factors also include regulations or legal rules, law enforcement, facilities and infrastructure, communities of legal jurisdiction and legal culture. One example is the Criminal Procedure Code (KUHAP) a rule that regulates that persons with disabilities can give their statements without being under oath so that the testimony of a disability witness is considered unable to describe the real situation. This is because witnesses regulated in the Criminal Procedure Code are people who see, hear and/or experience themselves.

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This provision is felt to have reduced the right of persons with disabilities to get their right to justice, for example, deaf persons with disabilities cannot hear a criminal event but can see the event that occurred. Or people with intellectual disabilities whose circumstances are generalized, because there are intellectual disabilities that are still in the mild category so that they can still be aware of the situation and provide good information. The information of persons with disabilities is not sworn because it is considered incompetent, whereas the information provided by persons with disabilities is considered not as strong as the testimony of witnesses who are not disabled. The vulnerability of people with disabilities to become victims of criminal acts makes information from people with disabilities very important. These discriminatory actions can cause the criminal justice process to be hampered.

Articles 12 and 13 of the Convention on the Rights of Persons with Disabilities (CRPD) have stipulated that the state must ensure that persons with disabilities shall have equal opportunities and treatment in the justice system so that persons with disabilities can provide full participation in the judicial process. In this case, the state must also provide training to its Law Enforcement Officers to understand and have a perspective on people with disabilities.

As in the case of a 25-year-old woman with a disability in Solok who was a victim of Rajapaksa. The victim had been harassed and then raped 3 times near the grave by the victim's neighbours. The victim's family, who was accompanied by LBH Padang, has reported the case to the police. The victim has also conducted a visum confirming the existence of signs of sexual violence against the victim even though the forensic team still does not believe that the act was carried out by the perpetrator. The settlement of this case has an obstacle, namely the police do not seem to have an understanding or perspective towards people with disabilities. The Police did not understand the condition of the visually impaired victim, and there was still an assumption that the victim was an adult even though the victim was intellectually immature. The Police still use Article 256 of the Criminal Code (KUHP) and do not mention the Sexual Violence Crime Law even though the TPKS Law is felt to be able to provide justice to victims of sexual violence and is clearer in regulating people with disabilities. The police also asked witnesses who were present at the time of the incident or witnesses who saw the victim leave with the perpetrator, while there were no witnesses at the time of the incident, there were only witnesses who listened to the victim's statement for the first time.

The case shows the importance of witness statements from people with disabilities considering the vulnerability of people with disabilities to being victims of sexual violence and the possibility that there were no witnesses present at the time of the incident, where the crime of sexual violence is often carried out in a closed, quiet place and/or in the absence of other people. In this case, it can also be seen that Law Enforcement Officers (APH) still use the Criminal Code (KUHP) and the Criminal Procedure Code (KUHAP) to resolve the Crime of Sexual Violence even though there is

already a Law on the Crime of Sexual Violence which more specifically regulates the rights of victims and the handling of cases of persons with disabilities.

The Criminal Code is considered unable to fulfil the rights of victims and the Criminal Code is still oriented towards protecting the rights of suspects and defendants. In terms of the crime of sexual violence, Article 184 of the Criminal Code is often an obstacle in resolving cases due to the victim's report being rejected because there is not enough evidence, especially if the victim is disabled. The low knowledge and perspective of law enforcement officials are also a factor that hinders the effectiveness of law enforcement. The provisions in the Criminal Procedure Code are also considered to be unable to accommodate the obstacles and interests of persons with disabilities, including in the case of persons with disabilities as witnesses. Where the provisions in the Criminal Procedure Code are used as a reason to reject the testimony of witnesses and/or victims with sensory disabilities because they are considered unable to see or hear the criminal event directly.

The Law on the Crime of Sexual Violence itself has stipulated in Article 25 paragraph (4) that "the testimony of witnesses and/or victims with disabilities has the same legal force as the testimony of witnesses and/or victims who are not persons with disabilities". This provision is a breath of fresh air in the protection and settlement of criminal justice for persons with disabilities. Then this writing will describe the urgency and implications of regulating the statements of witnesses and/or victims with disabilities who have the same legal force as the statements of witnesses and/or victims who are not persons with disabilities according to the Sexual Violence Crime Law.

## **Research Methods**

The approach method used in this study is a normative juridical approach method, which is an approach that is carried out based on juridical materials in the form of laws and regulations and literature that is a theoretical concept, which will be carried out by analyzing theories, concepts, legal principles as well which are then connected to the problems that are the subject of discussion. This method is also based on secondary data research, namely data obtained from library materials in the form of scientific writings and other written sources.

The writing of the research is descriptive analysis which aims to explain, elaborate, and provide a detailed description of the topic being researched. The materials used in this study come from secondary data sources, namely: Primary legal materials which are the main sources of mandatory binding legal materials, including basic norms, namely the 1945 Constitution, Law Number 12 of 2022 concerning the Crime of Sexual Violence, the Criminal Procedure Code and Law Number 8 of 2016 concerning Persons with Disabilities. Secondary legal materials are also used as an explanation of primary legal materials that include documents, scientific books or scientific papers, as well as articles from the internet or print media related to this research. Tertiary legal materials are also used as an additional description of primary legal materials and secondary legal materials

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such as general dictionaries, legal dictionaries, national and international legal encyclopedias or relevant electronic media.

## **Results and Discussion**

### **Witness and/or Victim Statements**

Law Number 31 of 2014 concerning Amendments to Law Number 13 of 2006 concerning the Protection of Witnesses and Victims Article 1 number 1 explains that a witness is a person who can provide information for investigation, investigation, prosecution and examination in court regarding a criminal case that he hears himself, sees himself, and/or experiences himself. Meanwhile, in number 2, it is explained that the victim is someone who experiences physical, mental, and/or economic suffering caused by a criminal act. In a criminal act, there is also a victim witness, namely a victim of a criminal act who is a witness where he or she has experienced the act or consequences of the criminal act himself.

The Witness Statement is included in one of the 5 (five) valid evidence by Article 184 paragraph (1) of the Criminal Code. Witnesses as evidence have an important role in the evidentiary process in criminal justice considering that they can provide information and facts for investigation, prosecution and justice through what they hear, see and experience themselves in a criminal act. Because witnesses hear, see and/or experience themselves, of course, it is expected that witnesses can provide information that can explain the crime and provide the real truth. Evidence in criminal cases is usually highly dependent on witness statements, where even though there is other evidence, witness statements are still the greatest opportunity to find out the occurrence of a criminal act.

The Criminal Procedure Code does not regulate the legal obligation of a witness to report himself or herself as a witness, but in Article 108 of the Criminal Procedure Code, it is explained that a witness has the right to submit a report or complaint either orally or in writing to the investigator and/or investigator. In Article 112 of the Criminal Code, it is also explained that a person who is summoned by an investigator must come and give his statement, whereas in Article 224 it is regulated sanctions if a witness called by an investigator does not fulfil his obligations. So it can be said that a person has no obligation to be a witness unless called by an investigator.

However, as evidence, witness testimony must be supported by at least one other piece of evidence to be considered to be able to prove that there is an error that must be accounted for by the defendant so that one witness is not enough to prove the defendant's guilt or commonly known as *Unus Testis Nullus Testis* (one witness is not a witness). The supporting evidence of the witness statement can also be in the form of different witness statements. In his consideration, the judge will pay attention to the conformity between the testimony of one witness and the testimony of another witness, or with other valid evidence. The judge is also free to assess the witness's testimony according to his beliefs so that in principle the power of proof of the witness is not binding but free.

### **Sexual Violence Crime**

Sexual violence is various acts of violence and/or treatment that degrade human dignity, are contrary to moral values and norms and disrupt public security and tranquillity. Sexual violence is a form of crime that is increasingly rampant and can occur anywhere, to anyone, whether women, men, children, parents or even people with disabilities. Sexual violence crimes are often described as an iceberg phenomenon, where criminal acts that come to the surface are very small compared to criminal cases that are not processed by law.

Sexual violence is often considered a violation of morality, even though the impact of the crime is very detrimental both physically, materially and mentally to the victim. The majority of victims of sexual violence come from vulnerable groups such as women, children and people with disabilities. This is certainly based on the people of Indonesia, most of whom are still in a patriarchal paradigm.

Law Number 12 of 2022 concerning the Crime of Sexual Violence is a breath of fresh air for the protection of sexual violence crimes which previously only relied on the Criminal Procedure Code which was felt to have not accommodated the protection of victims of sexual violence. Before the existence of the Sexual Violence Crime Law, several laws and regulations regulated sexual violence, but these various laws and regulations were felt to have not been able to fulfil the rights of victims and have not been able to answer the issues of sexual violence that are increasingly developing in society.

The Criminal Procedure Code also does not specifically regulate the handling of sexual violence crimes in criminal justice proceedings, which causes victims of sexual violence crimes to experience secondary victimization, as the handling and protection of victims of sexual crimes cannot be equated with victims of other crimes.

In the TPKS Law, it is explained that the crime of sexual violence is any act or act that meets the elements of a criminal act regulated in the TPKS Law and other acts of violence regulated in the law, as long as it is specified in the TPKS Law. These criminal acts are categorized into 9 (nine) types, namely physical and non-physical sexual harassment; forced contraception and/or sterilization; forced marriage; sexual torture; sexual exploitation; sexual slavery; and electronic-based sexual violence.

The TPKS Law also provides for exceptions regarding the principle of *Unus Testis Nullus Testis* as stated in Article 25 paragraph (1) that the testimony of witnesses and/or victims is sufficient to prove that the defendant is guilty if accompanied by 1 (one) other valid evidence and the judge has obtained confidence that a criminal act has occurred and the defendant is guilty of the act. The TPKS Law also stipulates that the testimony of a witness in a case of sexual violence can be in the form of a person who does not hear himself, does not see himself and/or does not experience himself, as long as the person's testimony is related to the criminal act.

The TPKS Law has also accommodated the protection of people with disabilities more specifically, such as the exception of complaints in cases of non-physical harassment and the imposition of penalties of one-third of the crime on perpetrators whose victims are persons with disabilities. Also, if a person with a disability becomes a witness and/or victim, it has the same legal force as the testimony of a witness and/or victim who

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is not a person with a disability. The Urgency of Regulating the Testimony of Witnesses and/or Victims with Disabilities Has the Same Legal Force as the Testimony of Witnesses and/or Victims of Non-Persons with Disabilities in the Law on the Crime of Sexual Violence.

The state has protected people with disabilities through the Law on Persons with Disabilities. The Law on Persons with Disabilities has also regulated the right of persons with disabilities to obtain equality in treatment before the law, recognition as a subject in law, and the provision of accessibility in judicial services. However, in reality, people with disabilities still get a lot of discrimination not only by the community but also by law enforcement officials. There are still many cases where reports of people with disabilities to the police are rejected for various reasons. One of them is because the proof of criminal acts is hampered by information that is subject to restrictions where people with disabilities are considered legally incompetent.

This restriction means that if a person with a disability provides information in the examination process at a criminal trial, the information provided is considered not strong enough to be a reference in finding the real facts or truth and is used as evidence such as the testimony of witnesses of people who are not persons with disabilities. This is certainly a factor that hinders, especially people with disabilities, including those who are vulnerable to becoming victims of sexual violence. The limitations that they have make it difficult for people with disabilities to defend themselves. People with physical disabilities will find it difficult to take action to defend themselves due to mobility barriers, and people with intellectual and/or mental disabilities who are victims are likely not to understand that the perpetrator's actions have a detrimental impact on them.

The testimony of witnesses and/or victims with disabilities can be the most necessary source of facts considering the crime of sexual violence, usually carried out in a closed place that results in the absence of witnesses other than the victim or in the case of non-physical sexual harassment, which cannot be proven by evidence and only relies on information from witnesses and/or victims. Therefore, the provisions regarding the testimony of witnesses and/or victims with disabilities so that they have the same legal force as the statements of witnesses and/or victims who are not persons with disabilities regulated in the Law on Sexual Violence Crimes are very important. This provision provides a guarantee of the right of persons with disabilities to be treated equally before the law as well as strictly regulated in the Law on Persons with Disabilities.

If the testimony of the witness and/or victim of the person with disabilities has the same legal force as the non-disabled one, then the testimony of the person with the disability can be used as valid evidence that cannot be ignored in the judge's consideration in giving a decision on the case. On the other hand, the testimony of witnesses and/or victims with disabilities who are not under oath will not be binding on the judge and will only be in the form of instructions. This will also cause difficulties in terms of proving the crime of sexual violence as the characteristics of this crime are usually carried out in a closed or hidden manner and seem to generalize the situation of people with disabilities.

For example, in the case of people with intellectual disabilities who have various levels of disability from mild to severe, so that at the low-level people with disabilities can still provide true information.

The power of proof of clue evidence can be considered by the judge if the clue is consistent with other evidence. However, in the crime of sexual violence which often has no other witnesses and has the possibility of not having evidence other than witnesses, the power of proof of the testimony of witnesses and/or victims of persons with disabilities is very necessary to obtain material truth. In this case, of course, the assistance of experts or companions with disabilities is needed in helping and preventing people with disabilities from being criminalized related to information under oath that they give.

### **Implications of Regulating the Testimony of Witnesses and/or Victims with Disabilities Has the Same Legal Force as the Testimony of Witnesses and/or Victims Not Persons with Disabilities in the Law on Sexual Violence**

The arrangement of witness and/or victim statements with disabilities that have the same legal force as witnesses and/or victims who are not persons with disabilities is indeed very necessary to ensure their rights and provide justice for persons with disabilities. However, this equitable distribution can result in criminalization for witnesses and/or victims with disabilities themselves. Article 174 of the Criminal Code stipulates that "if the testimony of a witness at a court hearing is suspected to be false, then the presiding judge gives a serious warning to him and if after that the witness still sticks to his statement, then he is then made a case with the charge of perjury mentioned in Article 242 of the Criminal Code", as for the content of Article 242 of the Criminal Code (1) and (2), namely that.

1. Whoever in circumstances where the law determines to give information on oath or to have legal consequences for such information, deliberately gives false information under oath, either orally or in writing, personally or by his attorney specially appointed for that purpose, shall be threatened with imprisonment for a maximum of 7 years.
2. If the false information above the oath is given in a criminal case and harms the defendant or suspect, the guilty person is threatened with imprisonment for a maximum of 9 years.

This criminalization can occur because each person with a disability has different limitations. Such as people with intellectual and/or mental disabilities who have difficulties in their intellectual and/or mental age, so there is a possibility that they cannot give a response or response according to reality. Meanwhile, if the testimony of witnesses and/or victims with disabilities is under oath, the information will have a legal liability value that can be sanctioned if it turns out to be false.

The judge has the authority to determine whether the testimony of witnesses and/or victims with disabilities can be considered legally capable or incompetent but must go through the results or testimony from experts such as doctors, psychologists and so on. A judge cannot decide whether a person is legally incompetent based solely on the limitations seen in the witness and/or victim. For this reason, in handling criminal cases involving people with disabilities, a Personal Assessment will be required. Article 25

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paragraph (5) of the Sexual Violence Crime Law also stipulates that the testimony of witnesses and/or victims must be supported by personal assessments as stipulated in the laws and regulations regarding appropriate accommodation for persons with disabilities in the judicial process.

Personal Assessment is an effort to assess the variety, level, barriers and needs of persons with disabilities, which is carried out both medically and psychologically to determine appropriate accommodation. This personal assessment is very important considering that people with disabilities have different types and levels, which will then require different accommodations and accessibility. Article 33 paragraph (2) and Article 32 of the Law on Persons with Disabilities stipulates that the judge must ask for evidence and testimony from doctors and psychologists to be able to determine whether the testimony of witnesses and/or victims can be declared legally capable or incompetent.

In examining and adjudicating cases involving persons with disabilities, it is necessary to involve disability companions or experts, especially in persons with intellectual and/or mental disabilities who cannot be known by looking at their physical appearance and have many varieties and levels. This is because many Law Enforcement Officers are still not trained to handle cases or problems involving psychological and/or psychosocial, and can determine infrastructure facilities or other accommodations needed by people with disabilities. The presence of a companion or expert will also prevent miscarriage of justice, including in terms of determining the intellectual and/or mental age of people with intellectual and/or mental disabilities.

The presence of a disability companion or expert can also help to identify whether the victim has the freedom to respond in the form of action or is indeed under the consequences of his disability/limitation. Things like this are what are needed to prove in the examination at trial. By also holding a personal assessment, law enforcement officials can prepare the accommodations and accessibility needed.

Therefore, the provisions for the testimony of witnesses and/or victims with disabilities have the same legal force as witnesses and/or victims who are not persons with disabilities as contained in Article 25 paragraph (4) of the TPKS Law, cannot stand alone. This article must go hand in hand with Article 25 paragraph (5) which requires the implementation of a personal assessment to see the impact that will or has been experienced by witnesses and/or victims in the crime of sexual violence. By holding a personal assessment, people with disabilities can be given appropriate accommodations such as companions or other infrastructure, so that the information provided can be conveyed truthfully. This provision is also expected to be the beginning for other laws and regulations, including the Draft Criminal Procedure Code, to guarantee the right to equal treatment, namely in this case the right of persons with disabilities to provide their statements with the same evidentiary power as those who are not persons with disabilities.

## Conclusion

The Criminal Procedure Code (KUHAP) stipulates that persons with disabilities can give their statements without being under oath. This provision is felt to have reduced the right of people with disabilities to get their right to justice. Especially in terms of sexual violence where women with disabilities are more vulnerable to becoming victims of sexual violence compared to women who are not disabled. The Law on the Crime of Sexual Violence is a breath of fresh air in the protection and settlement of criminal cases involving persons with disabilities, where Article 25 paragraph (4) stipulates that "the testimony of witnesses and/or victims of persons with disabilities has the same legal force as the testimony of witnesses and/or victims who are not persons with disabilities".

If the testimony of the witness and/or victim with a disability has the same legal force as the testimony of the witness and/or the victim who is not a person with a disability, the testimony of the person with a disability can be used as valid evidence that cannot be ignored in the judge's consideration in deciding the case. This will minimize difficulties in terms of proving the crime of sexual violence as the characteristics of the crime of sexual violence are usually carried out behind closed doors or in secret so that there are no other witnesses and there is a possibility that there is no evidence other than witnesses. On the other hand, the same legal force can result in criminalization for witnesses and/or victims of disabilities themselves. Therefore, the testimony of witnesses and/or victims of persons with disabilities must be followed by the implementation of personal assessments so that persons with disabilities can be given appropriate accommodations such as companions or other infrastructure, so that the information provided can be conveyed truthfully.

The need for provisions that can accommodate the protection and perspective of persons with disabilities, especially in the crime of sexual violence, including the hope that the Draft Criminal Procedure Code, can guarantee the right to equal treatment, in this case, the right of persons with disabilities to provide their statements with the same evidentiary power as those who are not persons with disabilities. Law Enforcement Officers (APH) must also be given understanding and perspectives to persons with disabilities to prevent criminalization and/or secondary victimization. Also, Law Number 12 of 2022 concerning the Crime of Sexual Violence must be re-socialized, so that law enforcement officials can move away from the old provisions that have not been able to fulfil the rights of victims and protect people with disabilities.

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